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No. 92-1544

In The

Supreme Court of the United States

October Term, 1992

PACIFIC LEGAL FOUNDATION,

Petitioner,

v.

PAUL KAYFETZ; VICTOR AMOROSO; DIANA LOPEZ FARNSWORTH; DORIS ELAINE LEMIEUX; JACK BOWEN McLELLAN; WILLIAM NIMAN; ORVILLE SCHELL; MARGUERITTE HARRIS; JUDITH WESTON; and BOLINAS COMMUNITY PUBLIC UTILITY DISTRICT,

Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

MOTION AND BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

WILLIAM PERRY PENDLEY*
*Counsel of Record
PAUL M. SEBY
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

Attorneys for *Amicus Curiae*
Mountain States Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation (MSLF) respectfully petitions to file the annexed brief *amicus curiae* pursuant to Supreme Court Rule 37. Petitioner has given its

consent to MSLF for the filing of an *amicus* brief. However, Respondents have denied consent. A copy of Petitioner's consent has been provided to the Clerk of the Court.

IDENTITY AND INTERESTS OF AMICUS

Mountain States Legal Foundation is a non-profit, membership, public interest law foundation organized pursuant to the laws of the State of Colorado and dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government, and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state in the country. Large numbers of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in many environmental issues. In addition, MSLF is active on behalf of its members and the public interest in seeking an equitable balance between economic and environmental objectives in the management of the public lands.

The interests of Petitioner and Respondents are with the impact of the decision below on each of them individually. MSLF believes that there are broader public policy concerns which will not be addressed adequately if the arguments set forth herein are not heard by this Honorable Court.

MSLF has participated in numerous cases before this Honorable Court either as an *amicus*, as attorney for one of the parties, or as an intervenor, most recently in *Lujan v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 695 (1990) and *Mountain States Legal Foundation v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 775 (1990).

MSLF's interest in the outcome of this lawsuit is directly tied to its ability to support the public's interest in environmentally sound resource development. MSLF has serious concerns that the Ninth Circuit's decision below will have a particularly chilling effect on cases involving novel legal theories.

WHEREFORE, Mountain States Legal Foundation respectfully requests the permission of this Honorable Court to participate in this case as *amicus curiae* and to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

WILLIAM PERRY PENDLEY *
*Counsel of Record
PAUL M. SEBY
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

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BRIEF *AMICUS CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amicus curiae* in support of Pacific Legal Foundation, the Petitioner for *certiorari*.[1]

INTERESTS OF *AMICUS CURIAE*

Mountain States Legal Foundation is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state in the country. Large numbers of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in many environmental issues. In addition, MSLF is active on behalf of its members and the public interest in seeking an equitable balance between economic and environmental objectives in the management of the public lands.

The interests of Petitioner and Respondents are with the impact of the decision below on each of them individually. MSLF believes that there are broader public policy concerns which will not be addressed adequately if the

[1] *Amicus* has obtained the written consent of Petitioner. The written consent of Petitioner has been provided to the Clerk of the Court. Respondents have declined to give consent. In accordance with Supreme Court Rule 37, a Motion for Leave To File Brief *Amicus Curiae* is provided herewith.

arguments set forth herein are not heard by this Honorable Court.

MSLF has participated in numerous cases before this Honorable Court either as an *amicus*, as attorney for one of the parties, or as an intervenor, most recently in *Lujan v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 695 (1990) and *Mountain States Legal Foundation v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 775 (1990).

MSLF's interest in the outcome of this lawsuit is directly tied to its ability to support the public's interest in environmentally sound resource development. MSLF has serious concerns that the Ninth Circuit's decision below will have a particularly chilling effect on cases involving novel legal theories.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amicus curiae, Mountain States Legal Foundation, hereby adopts petitioner's statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case.

SUMMARY OF THE ARGUMENT

The Ninth Circuit Court of Appeals improperly expanded the "inherent power" of Article III Courts to impose fee-shifting sanctions on a non-profit, public interest organization which was not a party to any litigation before the district court. The Ninth Circuit's decision

unduly burdens the ability of public interest organizations to continue the valuable contribution which they make to this Nation's legal system.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Is An Important And Recurring Issue That Demands Resolution By This Court

This is one of the most important and far-reaching cases affecting public interest legal organizations to come out of the Ninth Circuit in years. It is not only deeply disturbing for those organizations with public interest litigation programs similar to that of *amicus*, but to all other public interest organizations.

It seems so fundamental and beyond dispute that public interest attorneys feel compelled to practice law cautiously, knowing full well that their conduct is governed by Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, and ethical rules. However, if this decision is allowed to stand, such caution and precision is useless. A district court will be able to sanction public interest legal foundations instead of any responsible attorney, and thereby deter the activity of organizations which have brought so much to this nation's legal tradition and its respect for individual freedoms.

The opinion by the Ninth Circuit poses a direct financial threat to any non-profit organization that lends support to public interest litigation. The opinion also creates the uncomfortable dilemma for non-profit organizations

and their attorneys in that ethical rules generally prohibit attorneys from allowing third parties (including attorneys' employers, if different from the client) from interfering in the attorney-client relationship.

Thus, the goal sought by our Founding Fathers, free and open legal discourse on issues of public concern, will be thwarted. In light of the exceptional importance of this matter, involving as it does the continued vitality of public interest legal organizations, it is critical that this Honorable Court grant *certiorari*.

B. An Intolerable Conflict Exists Between The Decision Below And Decisions Rendered By This Court.

1. The Decision Below Is In Conflict With The Decisions Of This Court Which Seek To Properly Define The Bounds Of The Inherent Powers Doctrine Of Federal District Courts.

This Court has properly recognized that a court must have certain inherent powers in order to function and maintain its stature. Similarly, this Court has also been extremely careful in defining the scope of these inherent powers. This Court has recognized the dangers present by the misapplication of inherent powers and the significant risk these powers pose not only to litigants, but to our federal system of government.

During this Court's current opportunity to re-evaluate the inherent powers doctrine, the words of Justice Frankfurter, concurring in *Youngstown Sheet and Tube Co.*

v. Sawyer, 343 U.S. 579, 594 (1952), may prove to be a valuable reminder:

> [t]he accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.

Thus, this Court and a number of courts of appeals have articulated specific limitations on attempts to expand a federal court's inherent powers.

Recently, in *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123, 2132 (1991), this Court held that a district court may not invoke inherent power absent a determination that the exercise of such power is *necessary* to the court's operation. To ensure adherence to this "rule of necessity," a district court must not invoke its inherent power without first attempting to exhaust whatever powers are available to it under existing statutes or procedural rules. *Chambers* at 2141-42 (Kennedy, J., dissenting); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987). The Ninth Circuit transgressed these limitations by permitting the district court to ignore the application of adequate available means to protect its authority.

2. The Decision Below Is In Conflict With The Decisions Of This Court Which Require Exhaustion Of Express Sanctioning Provisions.

The decision of the Ninth Circuit Court of Appeals is directly contrary to this Court's decisions which require

district courts to "exercise the least possible power adequate to the end proposed." *Spallone v. United States*, 493 U.S. 265, 280 (1990) (internal quotations and citations omitted.)

In an attorney sanctioning context, individual justices of this Court have strongly stated that a district court must turn to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 before invoking inherent power. *Chambers*, 111 S.Ct. at 2141 (Kennedy, J., dissenting) and *Id.* at 2141 (Scalia, J., dissenting). These statements appropriately stem from concerns about the proper relationship between the judiciary and the legislative branch.

The "rule of necessity" in the inherent powers doctrine underscores the importance of avoiding unnecessary judicial encroachments upon legitimate Congressional authority. As Justice Kennedy observed in *Chambers*, "the American Rule recognizes that the legislature, not the judiciary, possesses constitutional responsibility for defining sanctions and fees. . . . " *Chambers*, 111 S.Ct. at 2142 (Kennedy, J., dissenting), *see Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *Business Guides, Inc. v. Chromatic Communication Enterprises, Inc.*, 498 U.S. ___, 112 L.Ed.2d 1140, 111 S.Ct. 940 (1991) (Kennedy, J., dissenting); and *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1975).

In the instant case, Congress has expressly made the judgment that attorneys should be held personally liable under Fed. R. Civ. P. 11 when their conduct so warrants. *See Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989). Further, Congress in 28 U.S.C. § 1927

again made the judgment that a district court could sanction, as in the Rule 11 context, any attorney admitted to practice in a federal court for improper behavior which detracts from the power of the court to protect litigants from frivolous claims.

The instant case therefore presents this Court with an opportunity to speak with a united voice concerning the limits of inherent judicial power, a subject which engendered a 5-to-4 split in the recent case of *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123 (1991). The majority in *Chambers* ruled that the scheme of statutes and rules provided by Congress to target bad-faith conduct had not "displace[d] the inherent power to impose sanctions" for such activity. *Id.* at 2134. Although on the facts of the case the majority did not perceive "that the District Court's reliance on the inherent power thwarted the purposes of other sanctioning mechanisms," *Id.* at 2136, the majority reaffirmed that "[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion," *Id.* at 2132, and that "the exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of Congress.'" *Id.* at 2137.

Justice Kennedy, in dissent, also emphasized that "[i]nherent powers are the exception, not the rule, and their assertion requires special justification in each case," and that the lower federal courts must not be permitted "to ignore express Rules and statutes on point." *Id.* at 2143 (Kennedy, J., joined by Rehnquist, C.J. and Souter, J., dissenting). Justice Scalia also voiced serious concerns, arguing among other things that "Congress may prescribe the means by which the courts may protect the integrity of their proceedings," and that "[a] court must

use the prescribed means unless for some reason they are inadequate." *Id.* at 2140-41 (Scalia, J., dissenting).

The Ninth Circuit has refused to recognize that its power to impose sanctions pursuant to its inherent power has been displaced by enactment of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. Such disrespect provides common ground for the majority and dissenting justices in *Chambers* and presents an important opportunity for this Court to underscore for the lower federal courts the basic axioms regarding the limits of judicial power.

The power of the federal courts "to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." *Palermo v. United States*, 360 U.S. 343, 353 n.11 (1959). Congress possesses the authority under the Necessary and Proper Clause "to enact laws carrying into execution the powers vested in other departments of the Federal Government," *Kaiser Aetna v. United States*, 444 U.S. 164, 172 n.7 (1979), including an "undoubted power to regulate the practice and procedure of federal courts." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941).

C. A Direct And Irreconcilable Conflict Exists Between The Decision Below And A Decision Rendered By Another Court Of Appeals.

The Ninth Circuit Court of Appeals opinion imposed sanctions, not on the attorneys who were before the court, but on their non-party employer, a non-profit, public interest organization. In this instance, the Ninth Circuit not only ignored Supreme Court precedent regarding

limitations on inherent power, but has also placed itself in direct conflict with the decision of the Fourth Circuit in *Blue v. Department of the Army*, 914 F.2d 525 (4th Cir. 1990).

In *Blue*, the Fourth Circuit held that district courts have no power to make distributional judgments between the attorneys who committed the alleged misconduct and the organization which financed the litigation. In that case the district court had imposed sanctions against several individual attorneys, one of whom was employed by the National Association for the Advancement of Colored People Legal Defense Fund. The lower court ordered the Legal Defense Fund not to pay any of the sanctions imposed on the attorneys. *Id.* at 549. The Fourth Circuit reversed, ruling that the district court had no power to control the Legal Defense Fund's allocation of its resources.

It is difficult, if not impossible, to ignore the holding of the Fourth Circuit in *Blue*. Yet, that is what the Ninth Circuit Court of Appeals has done. In the instant case, the district court made the very kind of distributional judgment that the Fourth Circuit held was beyond a district court's inherent power. Instead of pursuing sanctions against any attorney alleged to have committed litigation misconduct, the district court required the petitioner, a non-party to the litigation, to bear the financial responsibility of its employee's behavior.

Because the decision of the Ninth Circuit Court of Appeals is in direct conflict with the decision of the Fourth Circuit Court of Appeals, the petition should be granted.

D. The Decision Below Significantly Complicates The Delicate Balance Of Duty A Public-Interest Attorney Owes To The Client And To The Court.

The Ninth Circuit opinion significantly complicates the already complicated relationship among the attorney, the court, and the client. *Amicus* vividly recalls many instances where the multi-faceted duty was placed in conflict, demanding close and ethical scrutiny for proper resolution.

The Ninth Circuit opinion unnecessarily meddles in the attorney-client relationship in litigation funded by non-profit organizations such as *Amicus*. Because any non-party organization financing litigation may now be sanctioned based on the conduct of individual attorneys, *Amicus* would be forced financially to take an active and direct role in the conduct of litigation. This presents a direct and intrusive interference with the attorney-client relationship.

This presents an unfortunate dilemma for non-profit organizations and their attorneys. Ethics rules prohibit attorneys from allowing third parties (including attorneys' employers, if different from the client) from interfering with their professional judgment or otherwise interfering in the attorney-client relationship. In Colorado, for example, Rules 1.7, 1.9 and 1.13 of Colorado's Rules of Professional Conduct prohibit interference with the attorney's professional judgment or independence. The Colorado rules also prohibit participation in an organization furnishing legal services if the organization interferes with the attorney-client relationship. Yet, the Ninth Circuit's opinion effectively forces an organization

to interfere and micro-manage any litigation the organization funds or otherwise supports for fear of exposure to the types of liability at issue in the present case.

E. Public Interest Organizations Have Made Significant Contributions To The Development Of The Law And To The Public Good.

It is difficult to imagine a greater burden placed upon the shoulders of public interest organizations than that placed by the Court below. The Ninth Circuit decision will undoubtedly discourage a great deal of future cases if left undisturbed. The mere prospect of financial liability will deter public interest organizations from supporting litigation at all. Organizations which have in the past contributed so much to the public good by providing financial and logistical support will now be forced to question their involvement.

This Court need not be reminded of the fact that a number of this Court's landmark decisions were spawned by advocacy provided by public interest organizations. *E.g., Brown v. Board of Education*, 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenberg Bd. of Education*, 402 U.S. 1 (1971); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975); *Nollan v. California Coastal Comm'n*, 484 U.S. 825 (1987); *Mountain States Legal Foundation v. National Wildlife Federation*, 497 U.S. ___ (1990). Like many other non-profit organizations, *Amicus* Mountain States Legal Foundation does not charge fees for representation. In fact, MSLF provides attorneys to represent parties who could not otherwise afford to present their claims in court. It would be a sad occasion if justice in this country

now comes only from cases where individuals or organizations could afford to advance their causes.

CONCLUSION

For these reasons, *Amicus* Mountain States Legal Foundation urges this Court to grant this petition for writ of *certiorari*.

Respectfully submitted,

WILLIAM PERRY PENDLEY *
*Counsel of Record
PAUL M. SEBY
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

Attorneys for *Amicus Curiae*
Mountain States Legal Foundation

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